STATE OF MICHIGAN

COURT OF APPEALS

JULIE A. FIELEK, DONALD and LINDA RENFREW, OLGA F. WRIGHT, JOYCE HUBBS, BRUCE W. POLOZKER and NSJB INVESTMENT LTD., a Michigan co-partnership, and AGNES L. MUSOLF and ALBERT MUSOLF,

Plaintiffs-Appellants,

v

BRIGHTON TOWNSHIP, a Michigan municipal corporation,

Defendant-Appellee.

UNPUBLISHED
June 26, 1998

No. 198221
Livingston Circuit Court
LC No. 92-012508 CZ

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiffs, owners of large parcels of undeveloped property within Brighton Township, brought an action against the township on December 3, 1992, seeking a declaration as to the constitutionality of the Residential Country Estate ["RCE"] zoning ordinance enacted by the township in January 1992 which rezoned plaintiffs' property from a minimum of 2.5 acres per residential structure to a minimum of five acres per residential structure. Plaintiffs appeal by right the circuit court's dismissal of their action for lack of subject matter jurisdiction due to lack of ripeness because plaintiffs had failed to receive a "final decision" by the township as to the application of the RCE zoning ordinance to plaintiffs' properties. We affirm the dismissal of plaintiffs' action, but hold that dismissal is also warranted on the basis of mootness as to any plaintiff whose property is no longer subject to the RCE five-acre residential zoning ordinance challenged below in the trial court.

I

Prior to the enactment of the RCE five-acre residential zoning ordinance which became effective January 1992, all of the plaintiffs' properties were zoned under an ordinance which provided for 2.5-acre minimum lot sizes. On August 15, 1995, which was the day trial started in this case, the township

rezoned approximately 4000 of the 5200 acres in the RCE zoning district back to the 2.5-acre minimum lot requirement that had previously applied to the property. Although the record is unclear, the property that was rezoned back to the 2.5-acre minimum lot requirement apparently included much of the property of the instant plaintiffs. Thus, pursuant to the August 15, 1995 rezoning, at least some of the property owned by the instant plaintiffs was no longer subject to the RCE zoning ordinance being challenged. In deciding this case, the trial court did not consider the August 15, 1995 amendment to the zoning ordinance because it erroneously believed that it must look at the zoning ordinance in effect at the time that plaintiffs filed their complaint—December 3, 1992.

When a zoning ordinance that is the subject of a lawsuit is amended during litigation, the general rule is that the zoning ordinance to be applied is that which is in effect at the time of the trial court's decision. *MacDonald Advertising Co v McIntyre,* 211 Mich App 406, 410; 536 NW2d 249 (1995); *Lockwood v Southfield,* 93 Mich App 206, 211; 286 NW2d 87 (1979); *Klyman v City of Troy,* 40 Mich App 273, 277; 198 NW2d 822 (1972). See also 4 Young, Anderson's American Law of Zoning (4th ed), § 27.38, pp 636-641, § 30.18, p 796, and 8A, McQuillan, Municipal Corporations (3d ed rev, 1994), § 25.298, p 593. The general rule is subject to two exceptions; a court will not apply an amendment to a zoning ordinance if: (1) the amendment would destroy a vested property interest acquired before its enactment, or (2) the amendment was enacted in bad faith and with unjustified delay. *MacDonald, supra* at 410-411*; Lockwood, supra;* Neither of the foregoing exceptions apply in this case.

We hold that the general rule applies and the zoning ordinance as amended on August 15, 1995—which rezoned much of the property in the RCE district back to a 2.5-acre minimum lot requirement in place of the five-acre minimum lot requirement at issue--was controlling at the time the trial court made its decision in this case. We further hold that to the extent that the RCE five-acre residential zoning ordinance challenged below has been amended and is no longer applicable and enforceable against the property of any plaintiff in this case, that plaintiff's claims against the township are moot. *People v Mansour,* 206 Mich App 81, 82; 520 NW2d 646 (1994); American Law of Zoning, pp 637-638, 797 n 29; 83 Am Jur 2d, Zoning and Planning, § 1069, pp 894-895.

II

As to any plaintiffs whose claims against the township are not moot, we affirm the trial court's dismissal of their action on the basis that plaintiffs' constitutional claims were not ripe for judicial review. Plaintiffs' judicial challenge to the validity of the RCE zoning ordinance as applied to their properties, whether analyzed as a deprivation of substantive due process or as a confiscatory taking claim, was not ripe for review by the trial court because the township had not reached a final, definitive decision regarding the application of the ordinance to the properties at issue. *Williamson Co Regional Planning Comm'n v Hamilton Bank of Johnson City,* 473 US 172; 105 S Ct 3108; 87 L Ed 2d 126 (1985); *MacDonald, Sommer & Frates v Yolo Co,* 477 US 340, 351; 106 S Ct 2561; 91 L Ed 2d 285 (1986); *Seguin v City of Sterling Heights,* 968 F2d 584 (CA 6, 1992); *Paragon Properties Co v Novi,* 452 Mich 568, 576-581; 550 NW2d 772 (1996); *Electro-Tech, Inc v H F Campbell Co,* 433 Mich 57, 79; 445 NW2d 61 (1989). We agree with the trial court that plaintiffs did not obtain a "final decision" from the township regarding their development plans and therefore failed to meet the

finality requirement of *Williamson, supra,* and its progeny because plaintiffs did not formally present their development plans to the township and seek either a land use variance or rezoning to proceed with the developments. *Williamson,* 473 US at 190-191, 199-200; *Paragon, supra* at 580-581; *Electro-Tech, supra* at 84-85. See generally, *Agins v Tiburon,* 447 US 255; 100 S Ct 2138; 65 L Ed 2d 106 (1980). Until plaintiffs formally present their development plans and the township's objections are addressed and finally resolved, it is impossible to accurately determine the actual economic effect of the ordinance on their property, i.e., the extent to which plaintiffs' reasonable beneficial use and investment-backed expectations have been destroyed. *Williamson, supra*; *Paragon, supra* at 578-580; *Electro-Tech, supra* at 85. See also *MacDonald, Sommer,* 477 US at 351. Contrary to plaintiffs' assertion otherwise, it is at that point, and not before, that the requisite inquiry can be made as to whether the zoning ordinance inflicted "an actual, concrete injury." *Williamson, supra*; *Paragon, supra* at 579-580. We further agree with the trial court that plaintiffs did not establish the applicability of the futility exception to the finality requirement in this case. See *Seguin, supra* at 588.

The township must be given the opportunity to evaluate the land uses proposed by plaintiffs and make a final determination of the type of development it will consider on each subject property before plaintiffs run to court. None of the plaintiffs in this case afforded the township that opportunity. Thus, their claims were properly dismissed as premature and unripe for review. *Williamson,* 473 US at 200; *Paragon, supra* at 583; *Electro-Tech, supra* at 80-87.

III

In light of our disposition of the above issues, we decline to reach plaintiffs' remaining issues. See *Booth Newspapers, Inc v Univ of Michigan Bd of Regents,* 444 Mich 211, 234; 507 NW2d 422 (1993); *Northgate Towers Assoc v Royal Oak Charter Twp,* 453 Mich 962 (1996).

We affirm and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski